TAMABINA SDN BHD & ANOR v. NAKAMICHI CORPORATION BHD

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ABDUL AZIZ ABDUL RAHIM JCA
MAH WENG KWAI JCA
[CIVIL APPEAL NO: B-02-2439-11-2013]
27 JANUARY 2016

COMPANY LAW: *Meetings – Extraordinary general meeting – Failure to call – Application under s. 150 Companies Act 1965 – Whether court satisfied that it was impracticable to call for a meeting – Reasons provided – Whether acceptable – Whether lack of quorum sufficient evidence to show impracticability for calling or holding meeting – Whether impracticable to conduct meeting in accordance with company's articles of association – Failure to provide management accounts of company – Whether ground for impracticability – Rights to remove directors – Whether exercised in accordance with company's articles of association – Whether trial judge examined all evidence and circumstances of case*

The respondent was a public listed company which owned 51% of the first appellant. The second appellant was a director and shareholder in the first appellant. The other shareholder and director in the first appellant were Lo Shwu Fen and Lo Man Heng, respectively. On 14 June 2013, the respondent issued a notice under s. 144 of the Companies Act 1965 ('the Act') to the first appellant's then company secretary to convene an extraordinary general meeting ('EGM'). The issue that arose for consideration was in relation to the removal of the directors in the first appellant. On 4 July 2013, a notice was issued to the first appellant's members that the first EGM would be convened on 12 August 2013. However, the EGM could not be convened since the second appellant and Lo Shwu Fen could not attend the EGM, resulting in a lack of quorum. As a result, on 16 August 2013, the respondent filed an application pursuant to s. 150 of the Act for the court to order the meeting to be convened. On 22 August 2013, the respondent obtained an *ex parte* order which, *inter alia*, ordered the first appellant to call for an EGM within seven days. The second EGM was thus scheduled to be convened on 29 August 2013. However, Lo Shwu Fen and the second appellant did not attend the said meeting. It was argued that Lo Man Heng instructed the company secretary to convene the EGM on 23 September 2013 and not on 29 August 2013 as there was no agenda for the meeting. Further, the EGM could not be conducted since the company secretary resigned on 27 August 2013. It was alleged that the respondent, however, proceeded to convene the EGM illegally without an agenda and in the absence of the company secretary. In the High Court, the judge allowed the first appellant's application to set aside the *ex parte* order and dismissed the respondent's

inter partes injunction application. As a result of the setting aside, the respondent applied to amend its originating summons ('OS') to rectify the errors in its original OS in relation to the calling and holding of the EGM and providing an agenda for the said meeting. The amended OS, however, did not state the second appellant and Lo Shwu Fen as a party to the proceedings. The second appellant's application to intervene was allowed. Upon hearing arguments from both parties, on 8 November 2013, the High Court allowed part of the respondent's prayer in the amended OS and directed the first appellant to convene an EGM. The judge decided, *inter alia*, that (i) the court was satisfied that it was impractical to call a meeting in accordance with the articles of association of the company and the Act; and (ii) Lo Man Heng, the second appellant and Lo Shwu Fen did not have the intention to hold and convene a general meeting of the first appellant. On 28 May 2014, the first appellant's application for a stay of execution of the order dated 8 November 2013 was dismissed. However, the judge allowed the respondent's application pursuant to O. 45 r. 8 of the Rules of Court 2012 to call for the EGM of the first appellant within 21 days. Hence, this appeal. It was argued, *inter alia*, that (a) the respondent did not show any circumstances that it was impractical to call a meeting of the first appellant; (b) the second appellant had stated in her affidavit in reply to the OS that she had her own reasons for not being able to attend the first EGM as she was in Singapore at that time; (c) the judge erred when His Lordship concluded that Lo Shwu Fen failed to give any explanation to account for the absence at the EGM when she could not have done so since she was not even a party to the OS; and (d) the respondent as shareholder of the first appellant was only entitled to the company's accounts during the Annual General Meeting ('AGM'). With regard to the *ex parte* order dated 22 August 2013 to call for a second EGM, it was submitted that the order was to call for the EGM within seven days and not to hold the meeting within seven days.

Held (allowing appeal with costs)

Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) The onus was on the applicant to show that it was impracticable to call for a meeting of the company in any manner whatsoever or even to conduct the meeting in the manner prescribed by the articles of association of the company. Impracticable, however, does not mean impossible. In order to show impracticability, it was necessary to show evidence of attempts or efforts to call and hold a meeting and such attempts or effort had been futile. (paras 12 & 22)

(2) The reason for the futility in calling or holding a meeting must be attributed to some circumstances that made it almost impossible to hold the meeting. These circumstances could be due to a deadlock situation, an intentional un-cooperative attitude of the directors, a persistent effort to derail the meeting or deliberate non-attendance at the meeting after

a proper and valid notice had been issued so as to force the meeting to be called off for want of quorum. The categories of such reasons are never closed. This evidence must be in affidavit supporting the application under s. 150 of the Act. (para 22)

(3) Lack of quorum, *per se*, is not sufficient to be evidence of impracticability of calling or holding a meeting. The lack of quorum due to absentia of the required members of the board members must be adequately explained in the affidavit in support of the application. (para 22)

(4) Two situations must be present in order to succeed under s. 150 of the Act, *ie*, (i) it was impracticable to call for a meeting; and (ii) it was impracticable to conduct a meeting in accordance with the company's articles or the Act. On the facts, the respondent had not shown in the affidavit the presence of these two situations. (para 23)

(5) *Vide* her affidavit, the second appellant had reasonably explained her absence from the first meeting. She also explained as to why there was a serious dispute about the validity of the EGM on 29 August 2013 and the reasons she considered the EGM to be illegal. The meeting was conducted in the absence of a company secretary who had previously resigned from his office and there was no agenda for the meeting. Further, the alleged failure of the appellants to provide the respondent with the management accounts of the first appellant was not a ground of impracticability under the present circumstances. This was quite apart from the fact that the respondent as a mere shareholder of the first appellant was not privy to the management accounts under s. 170 of the Act. (paras 24 & 25)

(6) The respondent's right to remove any director of the first appellant must be exercised in accordance with the provision of the company's articles of association and the Act on removal of directors, and this includes giving a proper notice at the desired meeting for that purpose and the requirement of tabling a special motion. However, none of this had been complied with. Further, such right could be exercised if the deadlock on the Board would remain if no order was made. It had not been shown in the respondent's affidavit that there was such a situation. (para 27)

(7) *Vide* s. 150 of the Act, the judge was required to exercise his discretion after examining all the evidence and circumstances of the case and was satisfied that for practical reasons, the meeting could not be convened or conducted. On the facts, the judge had made the inference that the second appellant, Lo Man Heng and Lo Shwu Fen were acting in concert to stall the meeting and the main player was Lo Man Heng. However, the inference, on the affidavit evidence, was not justified. (para 28)

Case(s) referred to:

Chuah Sean Kin & Ors v. Persatuan Kenel Anjing Malaysia & Anor [2008] 1 LNS 788 HC ***(foll)***

Low Son Siang v. Lee Kim Yong [1999] 1 CLJ 529 HC ***(refd)***

Re El Sombrero [1958] 3 All ER 1 ***(refd)***

Re Opera Photographic Ltd [1989] 1 WLR 634 ***(refd)***

Yap Choo @ Yap Geok Yee v. Syarikat Agent ENE (Jalan Kelang) Sdn Bhd [2009] 1 LNS 574 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 128, 144, 150, 153, 167, 170

For the appellant - Gideon Tan, Brian Ernest Cumming & N Sivaraj; M/s Gideon Tan Razali Zaini

For the respondent - Chew Chang Min, Justin Wee, Jaslyn Saw & Furley Lim; M/s Lim Chong Phang & Amy

[Editor's note: For the High Court judgment, please see Nakamichi Corporation Berhad v. Tamabina Sdn Bhd; Lai Yun Fung (Intervener) [2014] 1 LNS 60 (overruled).]

Reported by Kumitha Abd Majid

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

[1] This is the appellant's appeal against the order of the High Court at Shah Alam dated 8 November 2013 allowing the application by the respondent under s. 150 of the Companies Act 1965.

[2] We heard this appeal together with two other appeals ie, Appeal No. B-02(IM)-1035-06-2014 and Appeal No. B-02(IM)349-02-2014 on 22 July 2015. They are related appeals. After hearing counsel for both the appellants and the respondent we allowed this appeal and Appeal No. 1035 with cost of RM30,000. We also ordered that the deposits in both appeals to be refunded. As for Appeal No. 349, this was ordered to be struck off with no order as to cost on it being withdrawn by the appellant.

[3] The following are our reasons for allowing this appeal. We will begin by stating the provision under s. 150 of the Companies Act 1965 which reads as follows:

> Section 150. Power of Court to order meeting.
>
> If for any reason it is impracticable to call a meeting in any manner in which meetings may be called or to conduct the meeting in the manner prescribed by the articles or this Act the Court may, either of its own motion or on the application of any director or of any member who would be entitled to vote at the meeting or of the personal representative of any such member, order a meeting to be called, held and conducted in such manner as the Court thinks fit, and may give such ancillary or consequential directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute

a meeting or that the personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised if he were present at the meeting.

[4] The gist of the section is that, if for any reason it is impractical to call a meeting or to conduct a meeting in the manner prescribed, the articles of association of the company or the Act, court may on its own motion or on an application of any director or any member entitled to vote at the meeting or personal representative of such member order a meeting to be called held and conducted in such manner as the court thinks fit. The key phrase in the section is 'if for any reason it is impracticable' to call or conduct a meeting.

[5] Based on this provision, the respondent had applied *vide* originating summons dated 16 August 2013 for an order that an extraordinary general meeting of the appellant's company to be called, held and conducted. The originating summons was an amended once. In the amended originating summons, the respondent also prayed for an order, that the proposed agenda for the meeting be tabled and put to vote at the meeting. Among the items on the agenda was the removal of one Lo Man Heng and one Lai Yun Fung as directors of the appellant and in their place the appointment of one Goh Kheng Peow and one See Thoo Chan as directors. Also included in the proposed agenda was the presentation of management accounts.

[6] The salient background facts to the filing of the originating summons by the respondent have been adequately narrated by the learned judge in his judgment and these are reproduced below:

1. The plaintiff is a public limited company listed on Bursa Malaysia. The defendant is a private limited company.
2. Under a sale and purchase agreement dated 17.12.2007 ("the Share Sale Agreement"), the plaintiff purchased 51% of the entire issued and paid-up ordinary share capital of the defendant from 2 individuals, namely Lo Shwu Fen and Yap Siaw Lin for a consideration of RM30 million.
3. Subsequently, the plaintiff and the vendors entered into 4 supplemental Share Sale agreement dated 21.1.2008, 3.12.2008, 29.5.2009 and 3.12.2009 (jointly referred to as "the Supplemental Agreements").
4. Pursuant to a Novation Agreement dated 3.12.2008 ("the Novation Agreement") entered into between Yap Siaw Lin and one Lai Yun Fung, all of Yap Siaw Lin's benefits, rights, duties, liabilities and obligations under the Share Sale Agreement and the 1st to 3rd supplemental share sale agreements were novated to Lai Yung Fong.
5. The acquisition of the 51% shareholding of the defendant was completed on 9.6.2009.

6. There are only 3 shareholders of the defendant company. They are:

   (i) the plaintiff holding 51%;

   (ii) Lo Shwu Fen holding 14.5%; and

   (iii) Lai Yun Fung holding 34.3%.

7. The defendant's board of directors comprises of only 2 directors, *viz.*, (i) Lo Man Heng; and (ii) Lai Yun Fung.

8. Lo Man Heng, Lo Shwu Fen and Lai Yun Fung are related parties. Lo Shwu Fen is Lo Man Heng's sister and Lai Yun Fung is Lo Man Heng's wife.

9. Lo Man Hing was a director of the plaintiff until his removal on 29.7.2013.

10. On 14.6.2013, the plaintiff issued a notice under s. 144 CA to the defendant's then company secretary to requisition an Extraordinary General Meeting ('1st EGM') to consider resolutions for the removal of Lo Man Heng and Lai Yun Fung as directors of the defendant company and for the appointment of Messrs Goh Kheng Peow and See Thoo Chan.

11. On 4.7.2013, the defendant issued notice to its members of the 1st EGM to be convened on 12.8.2013 in Sandakan to consider the resolutions described in the preceding paragraph.

12. On 12.8.2013, the 1st EGM could not be convened due to a lack of quorum. The failure of quorum is due to the non-attendance of Lai Yun Fung and Lo Shwu Fen at the 1st EGM. The defendant's articles of association requires a quorum of at least 2 members.

13. On 22.8.2013, the plaintiff obtained an *ex-parte* order which *inter alia* orderdered the defendant to call an EGM within 7 days to consider the resolutions for the removal of Lo Man Heng and Lai Yun Fung as directors. The *ex-parte* order was served on the defendant on 23.8.2013.

14. Pursuant to the *ex-parte* order, Lo Man Heng instructed the defendant company's then company secretary to give notice of an Extraordinary General Meeting ('2nd EGM') on 29.8.2013 at 3:00 pm.

15. Lo Shwu Fen and Lai Yun Fung did not show up at the 2nd EGM.

16. The defendant company did not call its Annual General Meeting ('AGM') in 2013. The last AGM was called in June 2012; the AGM for 2013 must be called no later than September 2013.

17. The *ex-parte* order was subsequently set aside on 26.9.2013 at the *inter partes* hearing of the plaintiff's application for the *ex-parte* order.

[7] For better appreciation of the circumstances of the case we tabulate below the chronology of events which learned counsel for the appellant said that the learned judge had failed to consider. This chronology of events is taken from the appellant's written submissions:

No.	Date	Details
1.	14.6.2013	The respondent issued a Notice under section 144 of the Companies Act, 1965 to requisite an EGM of the 1st appellant.
2.	12.8.2013	The 1st appellant's EGM was convened in Sandakan but was adjourned due to lack of quorum. EGM was adjourned for 6 weeks to 23.9.2013.
3.	16.8.2013	Respondent filed an Originating Summons for a section 150 Meeting, 4 days later although EGM was adjourned for 6 weeks.
4.	19.8.2013	Respondent filed *Ex-Parte* notice of application for Mandatory Injunction to direct an EGM but has no Agenda for an EGM.
5.	22.8.2013	Mohd. Sofian bin Tan Sri Abd. Razak J allowed the *Ex-Parte* notice of application for Mandatory Injunction to call for the 1st appellant's EGM. The Order *inter alia* only provided an Agenda for an AGM and not EGM.
6.	26.8.2013	1st appellant filed notice of application to set aside *Ex-Parte* Order dated 22.8.2013.
7.	27.8.2013	Lo Man Heng instructed Company Secretary to convene EGM on 23.9.2013 and not on 29.8.2013 as there is no Agenda. The Agenda only provides for removal of Directors at the AGM not EGM. Company Secretary resigned on 27.8.2013 and there is no Company Secretary to conduct the EGM on 29.8.2013 as a result. Appellant's solicitors put respondent on notice there is no Agenda for the EGM on 29.8.2013.
8.	29.8.2013	Respondent held illegal EGM without Agenda and in absence of Company Secretary who resigned on 27.8.2013.
9.	30.8.2013	1st appellant's application to set aside the *Ex-Parte* Order dated 22.8.2013 fixed for hearing on certificate of urgency. However Vernon Ong Lam Kiat J called the matter for hearing in chambers but later directed for the matter to be heard in open Court.

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After waiting in open Court for a while, parties were informed by the interpreter to see the Deputy Registrar instead as the hearing will be adjourned. Deputy Registrar was instructed to case manage the application and fix a new hearing date on 5.9.2013.

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Messrs Farid & Radhi, a solicitor friendly to the respondent and its solicitors attended Court serving a Notice of Change of Solicitors upon Messrs Gideon Tan Razali Zaini purporting to act on behalf of the 1st appellant.

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10. 2.9.2013 1st appellant filed a Notice of Appeal to Court of Appeal against the Order dated 22.8.2013 and the High Court's refusal to dispose of the 1st appellant's application to set aside the *Ex-Parte* Order dated 22.8.2013 immediately.

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11. 5.9.2013 1st appellant's application to set aside the *Ex-Parte* Order dated 22.8.2013 fixed for hearing before Yaacob bin Hj Md Sam J. The learned Judge adjourned the hearing to 26.9.2013 and made an Order that the *status quo* prior to Order dated 22.8.2013 to be maintained and Messrs Gideon Tan Razali Zaini is allowed to continue to represent the 1st appellant instead of Messrs Farid & Radhi.

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12. 11.9.2013 Messrs Farid & Radhi tried to circumvent Yaacob bin Hj Md Sam's J decision by filing and obtaining an *Ex-Parte* Order in another Court *vide* Shah Alam High Court Civil Suit No.: 22NCVC-570-09/2013 to *inter alia* restrain Messrs Gideon Tan Razali Zaini from representing the 1st appellant before Dr. Prasad Sandosham Abraham J.

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13. 20.9.2013 Court of Appeal (Rayuan Sivil No: B-02(IM)1920-09/2013) allowed the 1st appellant's application to stay the Order dated 22.8.2013 pending disposal of the 1st appellant's application to set aside the *Ex-Parte* Order dated 22.8.2013 and the respondent's *Inter Partes* Injunction application. As a result, the effect of the illegal meeting on 29.8.2013 pursuant to *Ex-Parte* Order dated 22.8.2013 was stayed and the adjourned EGM called by Lo Man Heng for 23.9.2013 could not proceed.

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14. 26.9.2013 Yaacob bin Hj Md Sam J heard the respondent's *Inter Partes* Injunction application and the 1st appellant's application to set aside the *Ex-Parte* Order dated 22.8.2013. The learned Judge set aside the *Ex-Parte* Order dated 22.8.2013 and dismissed the respondent's *Inter Partes* Injunction application with costs of RM12,000.00 and maintained the status quo of the 1st appellant prior to Order dated 22.8.2013.

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15.	2.10.2013	Dr. Prasad Sandosham Abraham J struck out the Shah Alam High Court Civil Suit No: 22NCVC-570-09/2013 for non disclosure of material facts and abuse of process by the respondent. The Judge was appraised of the decision dated 26.9.2013 and Court of Appeal Order dated 20.9.2013. Due to the setting aside, the respondent applied to amend its Originating Summons to rectify the error in its original Originating Summons *inter alia* relating to the calling and holding of the EGM and providing an Agenda for the EGM. The Amended Originating Summons did not name Lai Yun Fung and Lo Shwu Fen as a party at all.
16.	24.10.2013	Vernon Ong Lam Kiat J allowed the respondent's application to amend its Originating Summons dated 16.8.2013 and allowed the 2nd appellant's application to intervene as the 2nd defendant.
17.	1.11.2013	Lo Man Heng called for EGM to be held on 23.12.2013.
18.	7.11.2013	Parties argued orally before Vernon Ong Lam Kiat J. Judge adjourned his decision to 8.11.2013.
19.	8.11.2013	Vernon Ong Lam Kiat J allowed part of the respondent's prayer namely prayer (a), (b)(i), (ii), (iii) and (iv), (c), (d), (e), (f), (g), (h), (hh) and (i) in the respondent's amended Originating Summons dated 24.10.2013 with costs of RM10,000.00. The Order *inter alia* directs the 1st appellant to convene an EGM.
20.	5.12.2013	The respondent filed an *Ex-Parte* Notice of Application for a leave to commence Committal Proceedings against the appellants and Lo Man Heng.
21.	10.12.2013	Although Vernon Ong Lam Kiat J granted the Order dated 8.11.2013, Mohd. Sofian bin Tan Sri Abd. Razak J granted the respondent's a leave to commence committal proceedings against the appellants and Lo Man Heng.
22.	28.1.2014	Both the stay application and committal application were fixed for hearing before Vernon Ong Lam Kiat J. The learned Judge refused to hear the stay application and insisted parties proceed to hear the committal application and adjourned his decision to 5.2.2014.

A	23.	5.2.2014	Vernon Ong Lam Kiat J dismissed the committal application with costs of RM5,000.00 as the Order was not served within time upon the 1st appellant, not served at all upon the Directors of the 1st appellant and had lapsed.
B	24.	7.2.2014	The respondent filed an appeal against the Order dated 5.2.2014 to Court of Appeal (Rayuan Sivil No: B-02(IM)-349-02/2014). This appeal is fixed for hearing on 7.7.2014.
C	25.	11.2.2014	Notwithstanding the pending appeal by the appellants against the Order dated 8.11.2013 and by the respondent against the Order dated 5.2.2014. The respondent filed a Notice of Motion pursuant to Order 45 rule 8 Rules of Court, 2012 to enable the respondent themselves to call the EGM of the 1st appellant.
D E	26.	28.5.2014	Vernon Ong Lam Kiat J heard the 1st appellant's application for a stay of execution of Order dated 8.11.2013, 5 months later and dismissed the same with costs of RM5,000.00. The learned Judge then heard the respondent's application pursuant to Order 45 rule 8 Rules of Court, 2012 and allowed the respondent to call the EGM of the 1st appellant within 21 days despite being *functus officio* and notified of the pending appeals would be withdrawn by the respondent if they take control of the 1st appellant.
F	27.	30.5.2014	The respondent convened an EGM of the 1st appellant pursuant to Order dated 28.5.2014.
G	28.	2.6.2014	The appellants filed an appeal to the Court of Appeal against the Order dated 28.5.2014 which allowed the respondent to call the EGM of the 1st appellant within 21 days. The appellants file a Notice of Motion in Court of Appeal for stay of execution of Order dated 8.11.2013 and/or for Interim Preservation Orders.
H	29.	11.6.2014	Messrs Farid Radhi purports to act for the 1st appellant and attempted to withdraw all of the 1st appellant's pending appeal again. Court of Appeal granted an Interim Preservation Order preserving the *status quo* of the 1st defendant prior to the Order dated 8.11.2013.
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[8] The learned judge had allowed the respondent's application in the amended originating summons because His Lordship found that 'the court is satisfied that it is impractical to call a meeting in accordance with the articles and the CA'. The learned judge summarised his reasons for so deciding in paras. 48 till 50 of his written judgment, which are reproduced below:

> 48. In summary, the conduct of the defendant, in particular of the directors Lo Man Heng and Lai Yun Fung in withholding the management accounts and monthly log productions from the plaintiff was unjustifiable and wrong in the circumstances. Their action is making sure that the 1st EGM was thwarted was assured by the non-attendance of the other 2 shareholders Lai Yun Fung and Lo Shwu Fen. The 2nd EGM which was directed under the *ex-parte* order was similarly thwarted by the solicitor's letter informing the company secretary not to proceed with the meeting.
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> 49. Clearly, the current state of affairs is unsustainable. The trust between the shareholders had broken down. The plaintiff as the majority shareholder were (*sic*) entitled to call for a general meeting to resolve the impasse (*Wheeler v. Ross* [2011] EWHC 2527; *Union Music Ltd & Anor v. Watson & Anor* [2003] EWCA Civ 180). The fact that the plaintiff only made one attempt to call and convene a meeting does not preclude the making of an order under s. 150 (*Smith v. Butler* [2012] EWHC Civ 314; *Wheeler v. Ross*, *supra*). The Court must consider all the surrounding circumstances to determine whether it is impracticable to call a meeting.
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> 50. On the totality of the evidence, the Court is satisfied that Lo Man Heng, Lai Yun Fung and Lo Shwu Fen had no intention to hold and convene a general meeting of the defendant. The relationship between the parties had plainly broken down irretrievably; as is further evidenced by Suit 519 and the winding-up petition filed by Lo Man Heng against the plaintiff.

[9] Before us the respondent submitted, in opposing this appeal, that the respondent is a public listed company and owns 51% of the first appellant. The second appellant is director and shareholder in first appellant. Together with his sister in law Lo Shwu Fen, the second appellant own the remaining 49% shares in the first appellant. So the respondent is the majority shareholder in the first appellant. The first appellant issued a notice dated 14 June 2013 to the company secretary pursuant to s. 144 of the Companies Act 1965 to requisition an Extraordinary General Meeting to remove Lo Man Heng (the husband of the second appellant) and the second appellant as directors of the first appellant. However, the EGM which was scheduled in the notice on 12 August 2013 was dissolved because on non-attendance of the first appellant and Lo Shwu Fen, the other shareholder. They gave no reason for their non-attendance and they also did not appoint any proxy to attend and vote at the meeting on their behalf.

[10] It was submitted that first appellant did not call its AGM for the entire year of 2013. It was contended that Lo Man Heng and the second appellant do not intend to call any meeting of the first appellant to protect their own personal interest in the first appellant. It was further submitted that the first appellant refuses to provide its management accounts to the respondent till today, though it has been providing them in the past until the dispute arose between Lo Man Heng and the respondent.

[11] It was argued for the respondent that being the majority shareholder in the first appellant, the respondent has a right to call a meeting and exercise its voting power to remove Lo Man Heng and the second appellant as the first appellant's directors. It was alleged that the mis-management of the first appellant has caused the company to run into debts with third parties and the second appellant and Lo Man Heng as the first appellant's directors were unwilling or unable to deal with the debts. It was also submitted that both the second appellant and Lo Shwu Fen also did not attend the second EGM on 29 August 2013 which was called by Lo Man Heng pursuant to the *ex parte* order dated 29 August 2013. There is also bad blood between Lo Man Heng (and his family) and the respondent as evidenced by the fact that there are other suits involving the respondent and Lo Man Heng's family. One of these suit is the KL High Court Suit No. 22NCC-519-08-2013 commenced by the respondent.

[12] The appellant however submitted that the respondent has not shown any circumstances that it was impractical to call a meeting of the first appellant. The law is clear: The onus is on the applicant to show that it is impracticable to call for a meeting of the company in any manner whatsoever or even to conduct the meeting in the manner prescribed by the articles of association of the company. And impracticable does not mean impossible – see *Low Son Siang v. Lee Kim Yong* [1999] 1 CLJ 529. It was submitted that it was not a situation where there is deadlock of shareholders or where all the shareholders are dead. It was contended that the first EGM called on 12 August 2013 was adjourned for about six weeks to 29 September 2013. It was further contended that the learned judge never considered the adjourned meeting at all in his grounds of judgment.

[13] The appellant also submitted that the learned judge erred in deciding that the EGM scheduled on 12 August 2013 was deliberately frustrated for lack of quorum by non-attendance of second appellant and Lo Shwu Fen. It was argued that it was incorrect for the learned judge to conclude that the second appellant had given contradictory statements as to her not attending the EGM on 12 August 2013 in her affidavits dated 16 October 2013 and 1 November 2013. It was submitted that in her affidavit in reply dated 16 October 2013, the second appellant had merely stated that she had her own reasons for not able to attend the first EGM on 12 August 2013 and wanted to intervene as a party in the respondent's originating summons application to court to 'appraise the court of her reasons'. We agree with

learned counsel for the appellant that this affidavit in reply by the second appellant relates to her application to intervene in the respondent's OS application as she was not made a party at that time. With regard to her affidavit dated 1 November 2013, it was submitted that this was filed by the second appellant to oppose the respondent's OS application and therein she stated her reasons for not attending the first EGM on 12 August 2013 – the reason was that she was in Singapore at that time. Thus, it was submitted that there is no contradiction at all in the statement by the second appellants in both her affidavits. It appears therefore that the learned judge had misread the statements by the second appellant in her two affidavits.

[14] Learned counsel for the appellant also submitted that the learned judge also erred when His Lordship concluded that Lo Shwu Fen failed to give any explanation to account for her absence at the EGM on 12 August 2013 when she could not have done so because she was not even a party to the originating summons. She could not be expected to file any affidavit to respond to the originating application.

[15] With regard to the *ex-parte* order dated 22 August 2013 to call for a second EGM, it was submitted that the order was to call for the EGM within seven days not to hold the meeting within seven days. However the learned judge found otherwise. His Lordship's finding was that there was no evidence that the first EGM on 12 August 2013 was adjourned to 23 September 2013 and that the affidavit evidence of Lo Man Heng and second appellant on the calling of an EGM on 29 August 2013 was inconsistent and of no probative value. It was submitted that His Lordship had based his findings on the statement found in paras. 5.1 and 5.2 of Lo Man Heng's affidavit in support in Rayuan Sivil No. B-02(IM)-1920-09/2013. We are inclined to agree with learned counsel for the appellant on this submission. The learned judge had in fact failed to consider in his judgment the averment in para. 6 of the second appellant's affidavit in reply dated 16 October 2013 where the second appellant categorically denied she and Lo Man Heng had called for EGM on 29 August 2013.

[16] Learned counsel for the appellant also submitted that the learned judge had ignored the evidence that the *ex-parte* order only provide for EGM to be called; there was no agenda for the EGM. The agenda was only for the AGM. The learned judge also, counsel for the appellant submitted, ignored the fact that the first appellant had sent email stating that the EGM will be held on 23 September 2013.

[17] It is the contention of the appellant that the meeting on 29 August 2013 was illegal and unlawful because it was held without any agenda and in the absence of the company secretary. It was submitted that this fact was also ignored by the learned judge.

[18] With regard to the management accounts of the first appellant, we agree with learned counsel for the appellant that the respondent as shareholder of the first appellant is only entitled to the accounts at the first appellant's AGM. This is expressly provided under s. 170 of the Companies Act 1965. And under s. 167 of the same Act, the accounts are privy only to the directors of the first appellant: see *Yap Choo @ Yap Geok Yee v. Syarikat Agent ENE (Jalan Kelang) Sdn Bhd* [2009] 1 LNS 574; [2009] MLJU 542.

[19] It was submitted for the appellants that the respondent had failed to exhaust all avenues as provided for in the first appellant articles of association before proceeding to the court – see *Chuah Sean Kin & Ors v. Persatuan Kenel Anjing Malaysia & Anor* [2008] 1 LNS 788; [2009] 8 MLJ 453.

[20] Finally, learned counsel for the appellant submitted that the purpose of the EGM was to remove the directors of the first appellant. However the respondent had failed to comply with the requirement of ss. 128 and 153 of the Companies Act 1965 on the removal of directors.

[21] On the foregoing, learned counsel for the appellant submitted as follows:

> It is apparent the Respondent failed to show it is impractical to call and hold the EGM of the 1st appellant at the material time. The 1st EGM on 12.8.2013 was adjourned to 23.9.2013 due to a lack of quorum but the Respondent was unhappy with the duration itself, not because of the impracticability of calling an EGM. It then filed the Originating Summons 4 days after the adjournment to have a Court convened meeting prematurely when the EGM was already pending. Subsequently the 2nd EGM on 23.9.2013 could not be held due to the events giving rise to serious disputes as to the proper Board of Directors of the 1st Appellant due to the Respondent's act of holding an illegal EGM on 29.8.2013 and subsequently stay granted by the Court of Appeal on 20.9.2013 as depicted in the chronology of events.
>
> There never was any "impracticability" in calling for an EGM at all contrary to the Respondent's allegations and this is apparent from Lo Man Heng's emails [pp. 1116 RR Jld 2 (11) & pp. 1489 RR Jld 2 (15)]. In fact upon regaining control of the 1st Appellant upon setting aside the *Ex-Part*e Order dated 22.8.2013, the original Board of Directors called for a valid EGM on 23.12.2013 *via* notice dated 1.11.2013 at pp. 1791-1797 RR Jld 2 (18). The learned High Court Judge ignored this notice and the 2 earlier emails fixing the EGM above and decided it was "impracticable" to do so!! There is no basis for the High Court to exercise its powers under Section 150 of the Companies Act, 1965 to convene the EGM of the 1st Appellant as it was not impractical to do so at the material time. The learned High Court Judge failed to address his mind to the facts, events and circumstances existing at the time in reaching his decision.

And

> The Originating Summons is nothing but a mischievous attempt to remove the current Directors of the 1st Appellant pursuant to a Section 150 Meeting under the guise of alleged "impracticability to call a meeting" so that it can completely disregard the legal provisions and safeguards provided for a removal of director under the Companies Act, 1965. Paras (a) & (b) of the Order dated 8.11.2013 provides for the removal of Directors of the 1st Appellant without taking into account the provision of Sections 128 and 153 of the Companies Act, 1965. The Order does away with all statutory protections available to the Directors of the 1st Appellant.

[22] We are inclined to agree with the above submission by counsel for the appellant. In our view, to show impracticability it is necessary to show evidence of attempts or efforts to call and hold a meeting and such attempts or effort have been futile. The reason for the futility in calling or holding a meeting must be attributed to some circumstances that make it almost impossible to hold the meeting. These circumstances could be due to a deadlock situation, an intentional un-cooperative attitude of the directors, a persistent effort to derail the meeting or deliberate non-attendance at meeting after a proper and valid notice had been issued so as to force the meeting to be called off for want of quorum. The categories of such reasons are never closed. This evidence must be in the affidavit supporting the application under s. 150 of the Companies Act 1965. However lack of quorum *per se* is not sufficient to be evidence of impracticability of calling or holding a meeting. The lack of quorum due to absentia of the required numbers of the board members must be adequately explained in the affidavit in support of the application.

[23] In *Chuah Sean Kin & Ors* (*supra*), the court said that to succeed under s. 150 two situations must be present. First, it is impracticable to call for a meeting and second, it is impracticable to conduct a meeting in accordance with the company's articles or the Act. We agree with this statement of the law. In the present appeal, the respondent has not shown in the affidavit the presence of these two situations.

[24] As we have alluded to earlier in this judgment the second appellant in her affidavit had reasonably explained her absence from the first meeting. She also had explained why there was a serious dispute about the validity of the EGM on 29 August 2013 and why she considered the said EGM to be illegal. The meeting was conducted in the absence of a company secretary who had previously resigned his office and there was no agenda for the meeting.

[25] We are also of the view that the alleged failure of the appellants to provide the respondent with the management accounts of the first appellant is not a ground of impracticability under the present circumstances, quite

A apart from the fact that the respondent as a mere shareholder of the first appellant is not privy to the management accounts under s. 170 of the Companies Act 1965.

[26] Wynn-parry J in *Re El Sombrero* [1958] 3 All ER 1 in construing the scope of the English s. 135(1) which is similar to our s. 150 observed that
B the word 'impracticable' in the section is more limited than the word 'impossible' and it appears that the question necessarily raised by the word 'impracticable' is for the court to examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be convened, held and conducted. It was also
C observed in that case that on the face of the section 'there is no express limitation which would operate to give the words 'is impracticable' any less meaning' than what has been stated earlier.

[27] With regard to the fact that respondent holds 51% of the shares in the first appellant and therefore, being the majority, has the statutory right to
D remove any director of the first appellant, our view is that such right must be exercised in accordance with the provisions of the company's articles of association and the Companies Act 1965 on removal of directors; and this includes giving a proper notice at the desired meeting for that purpose and the requirement of tabling a special motion. We find none of this have been
E complied with. In *Re Opera Photographic Ltd* [1989] 1 WLR 634, Morrit J said such right could be exercised if the deadlock on the Board would remain if no order is made. In our instant appeal it has not been shown in the respondent's affidavit that there is such situation.

[28] Finally, we will note that under s. 150 of the Companies Act 1965,
F the learned judge is required to exercise his discretion after examining all the evidence and circumstances of the case and be satisfied that for practical reasons the meeting could not be convened or conducted. In the instant appeal the learned judge had made the inference (at para. 42 of His Lordship's judgment) that the second appellant, Lo Man Heng and Lo Shwu
G Fen were acting in concert (to stall the meeting) and that the main player is Lo Man Heng. In our view the inference, on the affidavit evidence, is not justified for the reasons we have given above.

[29] Accordingly, this appeal is allowed and we made the order as mentioned in the second paragraph of this judgment.

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